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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The National Association of Broadcasters submits this brief *amicus curiae* in support of Metro-Goldwyn-Mayer Studios Inc., *et al.*, petitioners in the above-captioned proceeding.

INTERESTS OF *AMICUS*[1]

The National Association of Broadcasters (NAB) is a nonprofit, incorporated association of radio and television

[1] Pursuant to S. Ct. R. 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members and its counsel, contributed monetarily to the preparation or submission of this brief. Counsel of Record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Broadcast stations. With approximately 6,550 radio station and over 1,100 television station members, NAB serves and represents the American broadcasting industry.

This case presents issues of critical concern to *amicus* and its members. Broadcast stations distribute audio and video programming free over-the-air to listeners and viewers throughout the country. While broadcasters in many instances hold the copyright for the programming they distribute, they also acquire programming from other copyright holders. Broadcasters fully comply with the copyright laws, and they properly compensate other parties holding the copyrights to any content distributed free, over-the-air. *Amicus*, therefore, is greatly concerned by the court of appeals' action immunizing software purveyors who facilitate and enable, indeed encourage, widespread violation of the copyright laws through peer to peer operations. Broadcast stations obviously have a vital interest in protecting their copyrights in the content that they themselves create and distribute. And because broadcasters respect the copyright laws, the industry is also greatly concerned about unauthorized mass distribution of copyrighted material without respect for copyright law or national policy regarding programming exclusivity that supports localism in broadcasting.

SUMMARY OF ARGUMENT

In providing free over-the-air audio and video programming to the public, radio and television broadcast stations respect the U.S. copyright laws and pay for their use of copyrighted content as appropriate. This Court should not uphold a decision that penalizes content distributors who respect the copyright laws by immunizing from liability software purveyors who enable and encourage peer to peer content distribution involving the mass transmission of copyrighted material blatantly in violation of the law and the careful balance of protections developed by Congress and the

courts. In a digital environment where virtually perfect copies of audio and video programming can be transmitted to the world at large via the Internet, such a decision could easily undermine the entire system of copyright protection that promotes the creation of compelling content offered free over-the-air and seriously injure those content distributors who "play by the rules."

Copyright cases often involve the balancing of interests among copyright owners, content users and the public's access to copyrighted material. The court of appeals clearly erred in drawing the balance in this case because its decision actively encourages persons and companies to purposely ignore that their products and services are overwhelmingly used for activities infringing the copyright laws. Indeed, the respondents in this case engaged in willful blindness, taking affirmative steps to evade responsibility for infringement, while still profiting handsomely from it. This Court should clarify that the standard it previously established for secondary copyright liability does not immunize software purveyors who purposefully design their offerings to promote—and indeed depend for their commercial viability on—massive, widespread violation of the copyright laws.

ARGUMENT

For more than 80 years, the American broadcast industry has provided a creative mix of programming, first audio and then video, to the public free over-the-air. This important public service depends almost entirely upon selling advertising aimed at the viewers and listeners of broadcast programming. In providing this free over-the-air programming, broadcasters respect and depend upon the copyright laws of this country because they both create and license from others copyrighted material. The compelling content that broadcasters use to attract audiences will ultimately become less valuable and less available if the system for protecting

copyright interests is undermined. For this reason, the National Association of Broadcasters (NAB) files this brief as *amicus* to urge the Court to overturn the decision of the court of appeals in *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

The underlying facts of the case now before the Court are well described in the brief of the petitioners and will not be repeated here. Nor will we repeat the substantive arguments presented by petitioners and others critical of the decision below. Rather, this *amicus* brief simply expresses the view of the broadcast industry that immunizing those who facilitate and promote peer to peer (P2P) operations engaging in massive copyright infringement from copyright liability is harmful to the broadcast industry, as well as the public at large.

I. THE WIDESPREAD INFRINGEMENT OF COPYRIGHT PERMITTED BY THE DECISION BELOW UNDERMINES THE ENTIRE SYSTEM OF COPYRIGHT PROTECTION, INJURES CONTENT DISTRIBUTORS WHO RESPECT THE COPYRIGHT LAWS, AND CONTRADICTS THE NATIONAL POLICY OF LOCALISM ESSENTIAL TO AMERICAN BROADCASTING

The broadcast industry as a whole is spending billions of dollars to convert from analog technology to digital technology to better serve the public. More than 1350 television stations currently broadcast digital signals, which reach over 99 percent of television households in the country. Terrestrial digital radio is now available on a limited basis nationwide, and many more radio stations will soon be converting to digital broadcasting. The promise of this technology is great. Broadcasters will be better able to serve their audiences by, *inter alia*, offering vastly improved picture and sound quality and more diverse program offerings on multiple video and

audio streams. The promise of digital broadcasting services will be curtailed, however, and investment stranded, if compelling content becomes less available, or if broadcasters are unable to enforce local market exclusivity for their programming because of unscrupulous software purveyors who purposely ignore copyright law.

Potential Internet distribution of broadcast signals and content by *broadcasters* presents many novel business challenges and opportunities for the industry. Because their advertising revenues depend on the size of their audience, broadcasters want to distribute their signals to as many viewers and listeners as possible. But uncontrolled *third-party* distribution of broadcast signals through P2P systems such as the ones Grokster and StreamCast enable, could easily, in a digital environment, undermine the rights of broadcasters in their own copyrighted material, reduce the availability of quality programming for license, and even impair stations' ability to garner advertising revenues. For example, a *third-party* P2P operation could distribute, without geographic or other limits, virtually perfect digital copies of the most popular audio and video broadcast programming, such as *CSI* or *Desperate Housewives*. Yet the broadcaster would have no way of recouping any value from the wider distribution, particularly if, as is most likely, the redistributed programming does not contain the advertising the broadcaster originally transmitted. Certainly the unauthorized distribution of broadcast content without the commercial advertising that supports the content in the first place will undermine both broadcasters' ability to obtain advertising and to pay for the compelling content that attracts viewers and listeners. Continued deployment of software that facilitates P2P or similar systems that distribute audio and video programming without regard to the rights of copyright owners will consequently impair the ability of broadcast stations to garner the advertising revenue needed for their operations, including the acquisition and creation of content,

and will ultimately reduce the availability of that free programming.

Continuing to facilitate P2P operations also threatens the principles of localism and local station exclusivity embedded in federal law. Unlike many other countries that offer only national television channels, the United States has created a broadcasting system that enables more than 200 communities to have their own local television stations. And, many more communities have their own locally licensed radio stations. The success of this locally based free over-the-air broadcast model relies on the ability of stations to obtain and enforce local market exclusivity for much of their programming. Thus, for example, a television station can obtain the exclusive right to air a particular program such as *Law and Order*, and a radio station might seek exclusive rights to syndicated programming such as Tom Joyner or Rush Limbaugh, in their local markets. This right of exclusivity prevents other stations in the area, or stations from a distant market brought in by some other technological means, from diminishing their audience by duplicating the same programming.

Protection of local stations from importation of duplicative programming into their markets is thoroughly woven into the fabric of our legal system. Since the 1960s, for example, the Federal Communications Commission (FCC) has adopted and enforced network non-duplication, syndicated exclusivity, and sports blackout rules that bar cable systems from importing duplicative programming from distant stations. Congress acknowledged and supported these rules when it created the cable compulsory license in 1976, and in 1988 created a similar set of rules applicable to satellite television to protect local exclusivity. Congress reaffirmed those rules in the Satellite Home Viewer Improvement Act, and directed the FCC to apply syndicated exclusivity and sports blackout rules to satellite carriers as well. In doing so, Congress reasserted the importance of protecting and fostering the concept

of localism, and pointed out that "television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities." SHVIA Conference Report, 145 Cong. Rec. at 11792 (daily ed. Nov. 9, 1999).

Unbridled, unauthorized third party peer-to-peer sharing of broadcast signals without geographic or time-zone limitations would, however, substantially undermine these express Congressional policies promoting localism. Stated differently, what Congress has expressly prevented from occurring with regard to cable and satellite technology will occur over P2P operations, as national and international broadcast signals are distributed through P2P reproduction and retransmission. Indeed, the Copyright Office concluded in 1997 and reiterated in 2000, ". . . (W)e are concerned about the Internet's ability to disseminate programming 'instantaneously worldwide' without any territorial restrictions. . . . Unrestricted retransmission of copyrighted works could seriously compromise both the value and the integrity of those works." Statement of Register of Copyrights before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary at 4-5 (May 11, 2000).

The court of appeals' decision to immunize respondents from secondary liability—even though the respondents' business model is based on selling advertising to reach users it knows are infringing the rights of broadcasters and other copyright holders—must therefore be reversed. As petitioners and other *amici* explain in their briefs, the court's result is not compelled by law or reason. As a matter of law, copyright holders are entitled to fair compensation for the use of their material. The law permits reasonable use of copyrighted material by individuals under such principles as the fair use doctrine and compulsory licensing. But the law does not and should not permit third parties to profit from

unlimited and uncontrolled mass distribution of copyrighted material without consent of copyright holders and licensees.

In sum, this Court should not uphold a decision that penalizes content distributors who respect the copyright laws, such as broadcasters, by allowing other parties to design content distribution systems involving unauthorized and uncontrolled mass distribution of copyrighted material without any compensation to copyright holders. In a digital environment where essentially perfect copies of audio and video programming can be distributed to the world at large via the Internet, such a decision could easily undermine the entire system of copyright protection that promotes the creation of compelling content offered free over-the-air, and seriously injure those content distributors who "play by the rules." Moreover, it threatens to undermine our system of local broadcasting and the national policy of protecting that system.

II. THIS COURT SHOULD FIND RESPONDENTS SUBJECT TO SECONDARY LIABLITY FOR WIDESPREAD VIOLATION OF THE COPYRIGHT LAWS

Traditionally, copyright cases involve the balancing of interests among copyright owners, content users and the public's access to copyrighted materials. Fair use as codified in Section 107 of the Copyright Act illustrates the factors to be considered in such balancing. 17 U.S.C. § 107. Respondents' activities here do not provide even a close case. Under any analysis, the balance in this case should clearly *not* be drawn so as to immunize a company that purposefully designs its product in a way that promotes widespread violation of the copyright laws.

The court of appeals' decision actively encourages companies, such as Grokster and StreamCast, to purposely ignore the fact that their products are overwhelmingly used for

activities infringing the copyright laws. As the Court of Appeals for the Seventh Circuit noted in *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004), such "willful blindness" undermines the purpose of copyright law and should not be permitted, much less encouraged. *See* 334 F.3d at 650-51 (likening efforts by Internet Website operator to avoid knowledge of infringing uses to criminal intent). Indeed, respondents' behavior goes beyond mere "blindness," and extends to taking affirmative steps to evade responsibility for infringement, while still profiting handsomely from it. *See* Respondents' Petition for Certiorari at 6-8.

In light of the court of appeals' misapplication of the principles of secondary copyright infringement, this Court should clarify the standard for secondary copyright liability established in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, the Court found that the maker of a copying device used largely by individuals to reproduce copyrighted works for "fair use," such as personal copying for time-shifting purposes, could not be liable for contributory infringement. 464 U.S. at 456. It is unreasonable, however, to extend that holding to immunize companies such as Grokster and StreamCast whose software, from which they obtain commercial gain, is almost entirely used to facilitate infringing behavior. The broadcast industry does not object to some limited copying of its broadcasts for time shifting and personal use, but the infringement at issue here is a far cry from the "use that has no demonstrable effect upon the potential market for, or the value of, [copyrighted works] . . ." accepted in *Sony*. 464 U.S. 450. If the effectiveness of the copyright protections adopted by Congress is to be maintained in the Internet age, parties cannot be permitted to design and then profit from applications that depend on massive violation of the copyright laws.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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